



McCunn, J. (2018). Revolutions in Contractual Interpretation: A Historical Perspective. In A. Robertson, G. Virgo, & S. Worthington (Eds.), *Revolution and Evolution in Private Law* (1st ed.). Hart Publishing.

Early version, also known as pre-print

[Link to publication record in Explore Bristol Research](#)
PDF-document

This is the submitted manuscript (SM). The final published version (version of record) is available via Bloomsbury. Please refer to any applicable terms of use of the publisher.

University of Bristol - Explore Bristol Research

General rights

This document is made available in accordance with publisher policies. Please cite only the published version using the reference above. Full terms of use are available:
<http://www.bristol.ac.uk/red/research-policy/pure/user-guides/ebr-terms/>

REVOLUTIONS IN CONTRACTUAL INTERPRETATION: A HISTORICAL PERSPECTIVE

*Joanna McCunn**

I. Introduction

A spectre is haunting contractual interpretation – the spectre of history. It is well known that, in recent decades, a ‘fundamental change’ has overtaken the law of contractual interpretation, as ‘the old intellectual baggage of “legal” interpretation’ has been replaced with ‘common sense’ ideas about language.¹ The meaning of a contract is no longer to be determined by the meaning of its words, but by ‘what the parties using those words against the relevant background would reasonably have been understood to mean’.² Furthermore, disparate aspects of contract law, from the implication of terms to the remoteness rule in damages, have been recast as facets of interpretation.³ For writers outlining these changes, it has become traditional to throw them into sharp relief with a reference to what came before. Indeed, it is now almost impossible to open a book about contract law without encountering Wigmore’s remark that ‘The history of the law of interpretation is the history of a progress from a stiff and superstitious formalism to a flexible rationalism’.⁴

Some questions remain. Was Lord Hoffmann’s judgment in *Investors Compensation Scheme* a radical move in this direction, or simply one step in a more gradual trend? The basic premise, however, is rarely doubted: a stricter attitude to construction is the more ‘traditional’ approach of English law.⁵ One reason for this is that few writers venture further back than a century or so

* Clare College, University of Cambridge. The research for this chapter was funded by the Selden Society. I am grateful to Andrew Bell and Jeffrey Thomson for their comments, and to Lorenzo Maniscalco for his help with Latin translations.

¹ *Investors Compensation Scheme v West Bromwich Building Society* [1998] 1 WLR 896, 912, per Lord Hoffmann.

² *ibid* 913.

³ See generally Catherine Mitchell, ‘Obligations in Commercial Contracts: A Matter of Law or Interpretation?’ (2012) 65 Current Legal Problems 455.

⁴ John Henry Wigmore, *A Treatise on the Anglo-American System of Evidence*, vol 9, 3rd edn (Boston, Little, Brown and Company, 1940) 187. See, eg, Sir Kim Lewison, *The Interpretation of Contracts*, 5th edn (London, Sweet & Maxwell, 2011) 3; Gerard McMeel, *The Construction of Contracts*, 2nd edn (Oxford, Oxford University Press, 2011) 22; Jonathan Morgan, *Contract Law Minimalism* (Cambridge, Cambridge University Press, 2013) 229; Lord Nicholls, ‘My Kingdom for a Horse: The Meaning of Words’ (2005) 121 LQR 577, 577; *Bank of Credit and Commerce International v Ali* [2001] UKHL 8, [2002] 1 AC 251, 265.

⁵ See, eg, McMeel, *Construction of Contracts* (n 4) 24.

ago, when the courts were undoubtedly more wedded to the ‘plain meaning’ of the contract. If we have a vague idea of the further past, it is probably of a yet stricter period: a ‘primitive stage of formalism when the precise word was the sovereign talisman, and every slip was fatal’.⁶ It is generally admitted that no one today is an out-and-out literalist with ‘two horns and a long forked tail’,⁷ but we are willing to believe that lawyers of the past were helpless naïfs, bedazzled by the quasi-magical power of the written word.

This chapter aims to put that idea to rest. In fact, our current liberal approach to contractual interpretation has deep roots in the history of the common law, perhaps even more so than the much-maligned ‘old baggage’ of strict construction. The history of the law of interpretation is not the history of a straightforward progress, but of cyclical trends. Some eras are undoubtedly more formalist than others, but it is not clear that anyone has ever treated documents in the ‘stiff and superstitious’ way it is often claimed. One indication of this is that there is very little agreement as to when the bogeyman of literalism actually stalked the earth. McMeel, for example, points to the ‘sclerotic 1950s’,⁸ while Denning LJ, in the 1950s, blamed his own forebears.⁹ Perhaps he was thinking of the Victorians, who often get a bad rap,¹⁰ but Wigmore thought that sense had only begun to break through in the nineteenth century.¹¹ Meanwhile, Lord Hoffmann has accused everyone from the Middle Ages on.¹²

This chapter will focus on the mid-sixteenth century, a foundational period for contractual interpretation in England, and the time of a revolution that dwarfed even Lord Hoffmann’s. It was the setting for one of the most significant intellectual developments in common law history: the invention of legal interpretation. We will find that the early modern approach to contractual interpretation is surprisingly familiar, and that many modern debates on the subject had close counterparts in Renaissance England.

II. Some Background

First, though, some context is necessary, since the contract law of the sixteenth century looks

⁶ *Wood v Lucy, Lady Duff-Gordon* [1917] 222 NY 88, 91, per Cardozo J.

⁷ Sir Robert Goff, ‘Commercial Contracts and the Commercial Court’ [1984] LMCLQ 382, 388.

⁸ Gerard McMeel, ‘The Principles and Policies of Contractual Construction’ in Andrew Burrows and Edwin Peel (eds), *Contract Terms* (Oxford, Oxford University Press, 2007) 29.

⁹ *British Movietonews v London and District Cinemas* [1951] 1 KB 190, 202.

¹⁰ Lord Bingham, ‘A New Thing under the Sun? The Interpretation of Contract and the *ICS* Decision’ (2008) 12 *Edinburgh Law Review* 374, 375.

¹¹ Wigmore, *Treatise* (n 4) 189.

¹² Lord Hoffmann, ‘The Intolerable Wrestle with Words and Meanings’ (1997) 114 *South African Law Journal* 656, 670.

very different to the law today. In fact, ‘contract law’ had not yet been invented. In its place were a variety of actions that could be brought on what we would now describe as kinds of contracts. These included the action of covenant, which could only be brought on a deed, a formal instrument made under seal. There were also debt and detinue, which lay for the recovery of a definite sum of money or a specific chattel. By far the most common contractual action was debt sur obligation, brought to enforce a penalty clause in a type of deed known as a bond.¹³ Although the action of assumpsit was now available to enforce some informal contracts, the number of such cases remained relatively insignificant.¹⁴ Contracts were therefore of an overwhelmingly formal character. Deeds were commonplace, used for everything from conveyances, charterparties and building contracts to marriage agreements.¹⁵ Edward Coke observed that the interpretation of deeds concerned ‘every man (for, for the most part, every man is a lessor or a lessee)’.¹⁶

These contractual actions had not accrued many substantive doctrines: if the plaintiff had a deed, it would almost certainly be enforced.¹⁷ As a result, the main legal issue was to establish the meaning of the deed.¹⁸ And this was not only true for contractual actions, since a case that was originally brought on an action of trespass or ejectment could end up turning on a question of interpretation. The defendant might have resorted to self-help, driving the plaintiff off his land, and only after some pleading would it be revealed that the dispute centred on the meaning of a title deed.

The interpretation of deeds, then, formed a large part of the common law’s bread and butter. However, before the sixteenth century, judges were not particularly interested in enunciating grand theories of interpretation. As Thorne puts it, they simply saw the reading of documents as ‘an incidental, routine function of judicial administration’.¹⁹ This is of a piece with the courts’ general approach to law at the time. Baker has characterised medieval judges as referees, whose role was simply to apply certain rules in a predictable way, and who were not

¹³ AWB Simpson, *A History of the Common Law of Contract: The Rise of the Action of Assumpsit*, 1st edn (Oxford, Oxford University Press, 1975) 88.

¹⁴ In Trinity term of 1572, for example, there were 503 actions of debt sur obligation, and only three of assumpsit: *ibid* 125.

¹⁵ Sir John Baker, *The Oxford History of the Laws of England, Vol VI: 1483-1558* (Oxford, Oxford University Press, 2003) 819.

¹⁶ *Walker’s Case* (1587) 3 Co Rep 22a, 23a.

¹⁷ Baker, *Oxford History* (n 15) 814. The exceptions were pleas of duress or non est factum: *ibid* 829. There were no doctrines of mistake, fraud or undue influence in this period: Simpson, *A History of the Common Law of Contract* (n 13) 29.

¹⁸ Baker, *Oxford History* (n 15) 824.

¹⁹ Samuel Thorne (ed), *A Discourse upon the Exposition & Understandinge of Statutes* (San Marino, Huntington Library, 1942) 3.

expected to explain the reasons for their decisions; still less to alter the settled rules of the game.²⁰

However, the sixteenth century brought rapid change to the common law. Following the introduction of printing, the courts began to give greater weight to authoritative copies of written materials.²¹ At the same time, new humanist scholarship was encouraging a more rational approach to the law.²² Judges began to see it as their duty to make reasoned decisions, going beyond a rote application of the words of a text. It is unsurprising, therefore, that ideas about interpretation suddenly came to dominate the law. The courts recognised that interpretation could be a systematic process, and began to establish the rules and principles that underlay it. Techniques of interpretation were keenly debated by readers in the Inns of Court,²³ and the first English literature on the subject was produced.²⁴ Indeed, England was not alone in this respect: the whole of Europe was experiencing an ‘interpretation boom.’²⁵

It is widely recognised that elaborate theories of statutory interpretation were being developed in this period.²⁶ Unsurprisingly, contractual interpretation was affected too. Indeed, formal contracts were the documents that fell most frequently to be interpreted by the courts.²⁷ Changes to contract law, prompted by the rise of *assumpsit*, were also encouraging lawyers to rethink the conceptual basis of legal obligations. Ultimately, this would lead to the formulation of a general, agreement-based theory of contract law.²⁸ For now, however, interpretation was the only game in town. Lawyers began to formulate principles for interpreting deeds, grounded in sophisticated ideas about contractual intentions.

²⁰ Baker, *Oxford History* (n 15) 49.

²¹ See generally Ian Williams, “‘He Creditted More the Printed Booke’: Common Lawyers’ Receptivity to Print, c. 1550-1640” 28 *Law and History Review* 39.

²² Baker, *Oxford History* (n 15) 13.

²³ See, eg, Sir John Baker (ed), *John Spelman’s Reading on Quo Warranto* (Selden Society 1997) 89ff.

²⁴ See, eg, Thorne (ed), *A Discourse upon the Exposition & Understandinge of Statutes* (n 19), composed c. 1565 and usually attributed to Thomas Egerton (but see Sir John Baker, *The Reinvention of Magna Carta 1216-1616* (Cambridge, Cambridge University Press, 2017) 232-6); and *A Treatise Concerning Statutes, or Acts of Parliament, and the Exposition Thereof* (London, Tonson, 1677), composed in the late sixteenth century and usually attributed to Christopher Hatton.

²⁵ Ian Maclean, *Interpretation and Meaning in the Renaissance: The Case of Law* (Cambridge, Cambridge University Press, 1992) 35.

²⁶ See, eg, Georg Behrens, ‘Equity in the Commentaries of Edmund Plowden’ [1999] *Journal of Legal History* 25.

²⁷ Dyer’s reports, which are fairly representative of the cases he was involved in, contain only around a dozen cases on statutory interpretation, almost 30 on the interpretation of wills, and over 70 on the interpretation of deeds.

²⁸ David Ibbetson, *A Historical Introduction to the Law of Obligations* (Oxford, Oxford University Press, 2002) 146.

This chapter focuses on cases reported by Edmund Plowden and James Dyer, the two pre-eminent law reporters of their day. Dyer's reports cover his own legal career, between around 1532 and 1581,²⁹ while Plowden's *Commentaries* span the period 1550 to 1580. Both sets of reports show that the courts strongly emphasised the importance of identifying and implementing the parties' intentions. This was not a wholly new feature of the law: references to contractual intentions had been rare in the fourteenth century,³⁰ but became increasingly common from the mid-fifteenth century on.³¹ For the first time, however, the courts were developing a general theory of interpretation based on the intentions behind the contract. As a result, when faced with a choice between strictly applying the words of a deed and following the parties' intentions, the courts chose the latter in virtually every case. In fact, out of almost a hundred cases on the interpretation of deeds in Plowden and Dyer, there are only two in which the parties' intentions appear to have been trumped by the strict meaning of the text.³²

III. Contractual Interpretation in the Sixteenth Century

A. Throckmerton v Tracy³³

Throckmerton v Tracy is a good example of a mid-century case in which the court faced a mismatch between the technical meaning of a deed and the intentions of the parties. Henry Beeley, the Abbot of Tewkesbury, had granted 100 acres of land to a tenant for life. He then leased the reversion to John Smith for 21 years, beginning on the first Michaelmas to follow the death of the life tenant. John Throckmerton succeeded to Smith's title. Fifteen years later, the monastery was dissolved and the Abbot's reversion was surrendered to Henry VIII, who granted it to Richard Tracy, a Protestant theologian and friend of Thomas Cromwell. When the life tenant died, Throckmerton entered. Tracy promptly seized his sheep, provoking a lawsuit.

When challenged, Tracy explained that there had been a drafting error in the Abbot's lease, which meant that Throckmerton had nothing in the land. The problem was that the premises of the deed granted him the 'reversion' of the land, rather than the possession. However, the reversion had been immediately destroyed on the death of the life tenant, and no

²⁹ Sir John Baker (ed), *Reports from the Lost Notebooks of Sir James Dyer*, vol 1 (London, Selden Society, 1994) xxiii.

³⁰ JM Kaye, *Medieval English Conveyances* (Cambridge, Cambridge University Press, 2009) 243.

³¹ See, eg, YB (1440) Mich 19 Hen 6 pl 7 f3b-4b, 4b; YB (1456) Mich 35 Hen 6 pl 25 f15b-17b, 16a; *Southwall v Huddelston and Reynoldys* (1523) Hil 14 Hen 8 pl 1 (119 SS 150) 159, 160.

³² *Anon* (1554) Dyer 99b and *Earl of Huntingdon v Lord Clinton* (1557) Dyer 139a.

³³ *Throckmerton v Tracy* (1555) Plow 145.

longer existed for Throckmerton to take the following Michaelmas.³⁴ It was simply ‘no longer in Being’, and he had no right to claim anything else.³⁵

Throckmerton argued that this was an incorrect interpretation of the word ‘reversion’. He agreed that, if it were given its ‘proper’ legal meaning, the lease would be void. However, he claimed, the law should ‘draw the Words from their proper and usual Signification to fulfil the Intention of the Parties’.³⁶ After all, the Abbot’s intention was ‘very apparent’: he wanted to grant the possession of the land after the death of the life tenant, but he had fallen foul of a legal technicality by incorrectly using the word ‘reversion’.³⁷ He concluded that ‘if the Intent of the Parties appears, the Law will construe the Words in such Sense as to perform that Intent rather than in any other Sense’.³⁸

Broke CJ’s response has been cited as a paradigm of sixteenth century attitudes to interpretation: indeed, it forms the basis for Wigmore’s assertion that contractual interpretation was labouring in an age of ‘stiff and superstitious formalism’.³⁹ The Chief Justice objected that

there ought to be apt Words to express the Meaning, or else the Meaning shall be void... for if a Man should bend the Law to the Intent of the Party, rather than the Intent of the Party to the Law, this would be the Way to introduce Barbarousness and Ignorance, and to destroy all Learning and Diligence. For if a Man was assured that whatever Words he made Use of his Meaning only should be considered, he would be very careless about the Choice of his Words, and it would be the Source of infinite Confusion and Incertainty to explain what was its Meaning.⁴⁰

Indeed, these concerns about legal certainty sound very convincing. Unfortunately, Broke’s comments were not quite as authoritative as they seem. Firstly, they were made in dissent: the other three judges in the case took a very different approach. Secondly, his scruples do not seem to have troubled him for long: ‘afterwards,’ reported Plowden, he said that ‘he was content that Judgment should be given for the Plaintiff’ after all.⁴¹ In fact, Dyer even recorded

³⁴ *ibid* 152a.

³⁵ *ibid* 153. The *habendum* of the deed correctly specified the possession of the land, but, where a deed was internally inconsistent, the premises would take priority: *ibid* 152a.

³⁶ *ibid* 153a.

³⁷ *ibid* 159.

³⁸ *ibid* 153a.

³⁹ Wigmore, *Treatise* (n 4) 188.

⁴⁰ *Throckmerton v Tracy* (n 33) 162.

⁴¹ *ibid* 162a.

that Broke had ‘prepared an argument on both sides, and if any one of his companions had been against the lease, he would have argued for it’.⁴² This is not as surprising as it may at first appear: the modern doctrine of precedent was in its infancy, and so there was not yet an assumption that everything said from the bench was intended as an authoritative judgment.⁴³ Finally, Broke’s remarks were entirely unrepresentative of this period, with no other judge in Plowden or Dyer making a similar point. Much more typical were the speeches of the three remaining judges, all of whom agreed that the parties’ ‘Intent shall be pursued rather than the Words’.⁴⁴

Two of these judges, Stanford and Saunders JJ, made more comprehensive attempts to set out the principles of contractual interpretation. Saunders J, for example, urged judges not to ‘cavil about the Words in subversion of the plain Intent of the Parties’, which was ‘a kind of trickery, and an excessively clever but wicked interpretation of the law’.⁴⁵ Satirising literalism, he referred to Cicero’s example of a general who made a truce for 130 days, and attacked his enemy during the night. Such interpretation was ‘meer Injury and Injustice’; ‘*summum jus*,’ he warned, was ‘*summa injuria*’. Instead, judges should ‘observe and follow the Intent of the Words’, which were ‘the Testimony of the Contract’.⁴⁶ However, they could also apply other principles: remembering, for example, that ‘Deeds ought to have a reasonable Exposition, which shall be without Wrong to the Grantor, and with the greatest Advantage to the Grantee’.⁴⁷ Similarly, Stanford J explained that there were

three Rules for the Understanding of Deeds. First, that they shall be taken most beneficially for the Party to whom they are made; secondly, that a Deed shall never be void, where the Words may be applied to any Intent to make it good; and... thirdly, that the Words shall be construed according to the Intent of the Parties, and not otherwise.⁴⁸

These judgments are highly significant: they represent two of the first attempts to present the common law of interpretation as a coherent and principled system.

B. The Identification of Intentions

⁴² *Throgmorton v Tracey* (1555) Dyer 124b, 126b.

⁴³ Baker, *Oxford History* (n 15) 50.

⁴⁴ *Throckmerton v Tracy* (n 33) 160.

⁴⁵ *ibid* 161 (‘calumnia quaedam et nimis callida sed malitiosa juris interpretatio’).

⁴⁶ *ibid* 161a.

⁴⁷ *ibid* 161.

⁴⁸ *ibid* 160.

The most immediately striking feature of these judgments is the central place they give to the parties' intentions. This is entirely typical of interpretation cases from the period.⁴⁹ In *Colthirst v Bejushin*, for example, the defendant had been granted a life estate in certain land on condition that he live there continually. One question was whether he would have fulfilled the condition if he had lived there continually since entering the land, but did not actually enter until some time after the beginning of his term. Sjt Pollard argued that 'the Intent of a Condition ought always to be performed as well as the Words thereof'.⁵⁰ If Bejushin did not enter until ten years after the beginning of the term, he could hardly claim to have complied with the grantor's intention, even if he had technically performed the words. While the case was ultimately decided on another ground, Mountague CJ accepted Pollard's argument: 'I would readily admit that [the condition] ought to be taken according to the Intent of it, that he should be resident all the Term'.⁵¹

In *Chapman v Dalton*, counsel for the plaintiff cited *Colthirst* as authority for the proposition that a condition would not be performed if the words had been fulfilled but not the intention.⁵² In that case, the opposite question was at issue: would a covenant be performed if the intention had been fulfilled, but not the words? The defendant had agreed to make a lease to Chapman or his assigns in 21 years' time, but Chapman died before the time elapsed. The defendant argued that the covenant had become impossible to perform, because Chapman had not named any assigns in his will. The case was brought by the executor of Chapman's executrix. He claimed that the lease ought to be made to him,

[f]or in every Agreement made between any Parties the Intent is the chief Thing to be considered, and if... the Agreement cannot be performed according to the Words, yet the Party shall perform it as near to the Intent of the Agreement as he can.⁵³

The court agreed: although an executor was not, strictly speaking, an assign, it should be presumed that Chapman wanted him to have the lease nevertheless.

The courts, then, regarded awareness of the intention behind a legal instrument as essential to understanding its true effect. Indeed, it was more important than the words of the

⁴⁹ And, indeed, of sixteenth century law more generally: Louis Knafla, *Law and Politics in Jacobean England: The Tracts of Lord Chancellor Ellesmere* (Cambridge, Cambridge University Press, 1977) 44.

⁵⁰ *Colthirst v Bejushin* (1550) Plow 21, 23a.

⁵¹ *ibid* 34.

⁵² *Chapman v Dalton* (1565) Plow 284, 291.

⁵³ *ibid* 290.

contract, which only functioned as ‘testimony’ of the intention.⁵⁴ But how was this intention to be identified? After all, as Christopher St German had put it, ‘of the entent inwarde in the herte: mannes lawe can not Juge’.⁵⁵ And there were major impediments to ascertaining the intentions of the parties to a deed. For a start, a party to a case was prohibited from giving evidence on his own behalf in a common law court.⁵⁶ Furthermore, many deeds were not challenged in court until the original parties were long deceased.⁵⁷ Since no evidence of the parties’ actual intentions was generally available, the court was required to reconstruct them after the fact.

Often, of course, the parties’ intentions could simply be extrapolated from the deed itself. For example, it would be presumed that the parties had meant the words as they were ‘commonly used’.⁵⁸ If a word had been used in one part of the deed, it could be assumed to have the same meaning elsewhere:⁵⁹ as Anthony Browne J and Dyer CJ observed, ‘it is impossible to form a Judgment upon one Part only, without taking all the Parts into Consideration’.⁶⁰ In other cases, the courts would look at the context in which the contract had been made. In *Bold v Molineux*, for example, Bold’s father-in-law had promised to pay him £30 at the Feast of St John the Baptist in 1533, unless his wife died without a son ‘then living’. The question was whether ‘then living’ referred to the time of the Feast, or of the wife’s death. Bold argued for the latter, claiming that the Feast had only been named so that he ‘should have the money the sooner’.⁶¹ However, Fitzherbert and Baldwin JJ thought that the circumstances suggested a different intention. The purpose of the term had been that ‘if the issue die, the payment shall immediately cease’, as was ‘the common practice of all men who give large sums of money with the marriage of their children’.⁶²

C. Intentions and Reason

In other cases, the court did not look for the intentions of the actual parties, but resorted to general principles to establish what a reasonable party would have intended in the circumstances. This is where the other ‘rules’ set out in *Throckmerton* came into play. For example, Stanford J had held that ‘a Deed shall never be void, where the Words may be applied

⁵⁴ *Throckmerton v Tracy* (n 33) 161a.

⁵⁵ Christopher St German, *Doctor and Student* (TFT Plucknett and JL Barton eds, London, Selden Society, 1974) 230, first published 1530.

⁵⁶ Baker, *Oxford History* (n 15) 364.

⁵⁷ Sir John Baker, *An Introduction to English Legal History*, 4th edn (Oxford, Oxford University Press, 2007) 288.

⁵⁸ *Hill v Grange* (1556) Plow 164, 170a.

⁵⁹ *Anon* (1564) Dyer 233b.

⁶⁰ *Wrotesley v Adams* (1559) Plow 187, 196.

⁶¹ *Bold v Molineux* (1536) Dyer 14b, 15b.

⁶² *ibid* 17b.

to any Intent to make it good'.⁶³ After all, it could be assumed that the parties would have preferred their deed to take effect, 'rather than that the Intent of the Parties should be void'.⁶⁴ Thus, in *Browning v Beston*, the plaintiff claimed that insufficient words had been used to reserve a rent in a lease. The defendant argued that the law would take it that there was a rent, 'as strongly as if it had been expressed in plain Terms'.⁶⁵ As Sjt Catlyn put it, 'our Law, which is the most reasonable Law upon Earth, regards the Effect and Substance of Words more than the Form of them, and takes the Substance of Words to imply the Form thereof'.⁶⁶

Another of Stanford J's rules was that the terms of a deed 'shall be taken most beneficially for the Party to whom they are made'.⁶⁷ This is a form of the *contra proferentem* rule, which provides that a contractual term should be construed against the party 'proffering' it. Today, lawyers generally attribute its introduction into English law to Coke,⁶⁸ but in fact, it has been part of the common law since at least the late fourteenth century.⁶⁹ It was certainly well established by the time of Plowden and Dyer, and one of the participants in Edward Hake's Elizabethan *Dialogue on Equity* volunteered that he had 'hearde it often sayd'.⁷⁰ However, Hake's interlocutor also pointed out that the principle was difficult to square with an intention-based approach to interpretation. How, he asked, was it possible for the courts to interpret a deed in accordance with the intention of the parties, but also more beneficially for one party than the other?⁷¹

It appears that the rule simply operated as a presumption, which could establish the parties' intentions if they were not otherwise clear. If the grantor had the opportunity to limit his grant in some way and failed to do so, it could be presumed that he did not intend to limit it at all. After all, it was 'the natural Principle of Mankind to act and speak according as it suits best with their own Interest and Advantage'.⁷² In *Colthirst*, Sjt Saunders explained that the law

⁶³ *Throckmerton v Tracy* (n 33) 160.

⁶⁴ *Browning v Beston* (1555) Plow 131, 140.

⁶⁵ *ibid* 134.

⁶⁶ *ibid* 140.

⁶⁷ *Throckmerton v Tracy* (n 33) 160.

⁶⁸ See, eg, Edwin Peel, 'Whither Contra Proferentem?' in Burrows and Peel (eds), *Contract Terms* (n 8) 54.

⁶⁹ *Plessington v Mowbray & Ellerton* (1382) Mich 6 Ric 2 pl 17 (1996 AF 147-151) 148, per Sjt Rickhill: 'When a deed is made, the deed shall be taken more strongly against him who made the deed and more for him to whom the deed is made'.

⁷⁰ Edward Hake, *Epieikeia: A Dialogue on Equity in Three Parts* (DEC Yale ed, New Haven, Yale University Press, 1953) 54, composed c. 1598.

⁷¹ *ibid*.

⁷² *Report of Plowden's argument in Basset and Morgan v Manxel, at Serjeant's Inn* (1564) Plow 6a.

‘interprets the Words and Actions of every Man most strongly against himself’;⁷³ the courts would not deign to rescue a party if he had been so foolish as to bind himself by words he later regretted.

Finally, we come to Saunders J’s admonition that ‘Deeds ought to have a reasonable Exposition’.⁷⁴ He folded a rather diffident reference to *contra proferentem* into his general discussion of reasonable interpretation, claiming that ‘there is a Kind of Equity in Grants, so that they shall not be taken unreasonably against the Grantor, and yet shall with Reason be extended most liberally for the Grantee’.⁷⁵ Thus, the courts would allow *contra proferentem* to be trumped by the need to construe a deed reasonably. In *Hill v Grange*, for example, the defendant was required to pay rent at the Feast of the Annunciation and at Michaelmas. He argued that the rent was not due on the first Michaelmas of his lease, because the Annunciation was named first. The first rent, therefore, ought to be paid then, ‘for Reservations shall always be taken most strongly against the Reservors’.⁷⁶ The court refused to accept this argument, since the defendant’s interpretation would allow him to have ‘half a Year’s Profit, without paying any Rent for it’, which was ‘no Sort of Reason’.⁷⁷ Even in *Colthirst*, the judges preferred to think in terms of finding a reasonable interpretation: none took up Saunders’ discussion of *contra proferentem*, but instead approved his conclusions on the basis that ‘Conditions have always a reasonable Construction’ or ‘Conditions have a reasonable Intendment’.⁷⁸ Again, this was linked to the parties’ intentions: Hake, for example, argued that a contract should not be ‘expounded contrary to reason, which no doubt it sholde be if it were construed against the intent of the parties’.⁷⁹

Saunders and Stanford JJ were two of the first lawyers to try their hands at a systematic exposition of contractual interpretation. However, their presentations of the principles used by the courts were relatively crude. Stanford J, for example, presented his three rules on an equal footing. Yet, as we have seen, construing a deed in accordance with the parties’ intentions was the overriding aim of the court, while the other two rules simply helped to establish the relevant intentions. Similarly, Saunders J conflated the *contra proferentem* rule, reasonableness, and

⁷³ *Colthirst v Bejushin* (n 50) 29. See also, in the context of pleadings, *Stradling v Morgan* (1560) Plow 199, 202a: ‘It is reasonable to take it in that Sense which makes against him, for if his Complaint lies in the other Point it is his Folly that he did not shew it precisely’.

⁷⁴ *Throckmerton v Tracy* (n 33) 161.

⁷⁵ *ibid.* Hake came to the same conclusion: Hake, *Epieikeia* (n 70) 55.

⁷⁶ *Hill v Grange* (n 58) 171.

⁷⁷ *ibid* 171a.

⁷⁸ *Colthirst v Bejushin* (n 50) 30, 34.

⁷⁹ Hake, *Epieikeia* (n 70) 55.

intention-based construction into a single approach, without explaining how they interacted with one another.

Their accounts also demonstrate how closely the parties' intentions were identified with what reasonable parties would have intended. For example, they would always want their deed to be effective, and to be treated even-handedly. Perhaps this is why judges never observed, as St German did, how difficult it was to discern the content of a man's mind. Rather, they thought that intentions were so 'apparent' that 'every Man may discover' them, simply by referring to what was reasonable in the circumstances.⁸⁰ They were not interested in the parties' beliefs and motivations, but about the 'reasonable and equal intention' that could be extracted from their agreement.⁸¹ After all, a contract was a compromise between the two parties' interests: it could be assumed that they must have come to a 'reasonable and equal' conclusion.

D. Conceptions of Contractual Intention

The idiosyncrasies of this approach can be seen most clearly by comparing it with the construction of wills. It was well established that the testator's intentions were of paramount importance for the interpretation of a will: as Henry Swinburne observed, 'it is the mind and not the wordes of the testator, that giueth life to the testament'.⁸² Even Broke CJ admitted in *Throckmerton* that 'in Testaments the Intent only shall be observed and considered'.⁸³ However, when identifying the testator's intention, the courts very rarely resorted to general principles or presumptions about what it would have been reasonable for him to intend. Rather, they focused on indications of his actual intentions, such as the will itself, or the surrounding circumstances.⁸⁴ The intentions of a testator simply could not be established by reference to a general standard of reasonableness.

The intentions behind a deed, however, could. It is possible that this was a consequence of the courts' developing understanding of contractual intentions. When judges first began to consider the intentions behind a deed, they referred exclusively to 'the will of the donor'.⁸⁵ By the sixteenth century, however, their language had shifted, and what now concerned them was

⁸⁰ *Throckmerton v Tracy* (n 33) 159.

⁸¹ *Bold v Molineux* (n 61) 15a.

⁸² Henry Swinburne, *A Briefe Treatise of Testaments and Last Willes*, 1st edn (London, John Windet, 1590) 261.

⁸³ *Throckmerton v Tracy* (n 33) 162a.

⁸⁴ See, eg, *Clache's Case* (1573) Dyer 330b; *Welcden v Elkington* (1578) Plow 516; *Paramour v Yardley* (1579) Plow 539.

⁸⁵ See, eg, YB (1316) Mich 10 Edw 2 pl 14 (52 SS 46-52) 47.

the ‘Intent of both the Parties’.⁸⁶ This was a fundamental change: rather than expressing two parties’ separate intentions, a deed was coming to be seen as the embodiment of their single, common intention.

The effects of this development can be seen in a number of mid-century cases, in which the courts struggled with the issue of whether a grant or reservation made by one party could be understood to be intended by both. For example, in *Browning v Beston*, the plaintiff argued that the ‘rent’ mentioned in his lease was void because it had been expressed as a grant by the lessee, rather than as a reservation by the lessor. He claimed that it would be ‘utterly against Reason to take the Words of one Person as the Words of another’.⁸⁷ However, Sjt Morgan explained that this was the wrong way to think about the lease. He pointed out that debt could not be brought on the deed ‘except it be adjudged a Contract in Law, and a Contract cannot be without an Assent between two or more, wherefore the Assent of both Parties is the Perfection of the Contract’.⁸⁸ Therefore, as Sjt Catlyn put it, ‘in Contracts it is not material which of the Parties speaks the Words, if the other agrees to them, for the Agreement of the Minds of the Parties is the only Thing the Law respects in Contracts’.⁸⁹ Similarly, in *Reniger v Fogossa*, Sjt Pollard emphasised the minds of both the parties, defining an agreement as the ‘Union, Collection, Copulation and Conjunction of two or more Minds’.⁹⁰

Common lawyers, then, were beginning to think of a deed as the product of the parties’ common intention. This emphasis on ‘the agreement of the minds of the parties’ was connected by lawyers to their intention-based approach to interpretation. Again in *Browning*, Sjt Catlyn explained that ‘if any Persons are agreed upon a Thing... the Law always regards the Intention of the Parties, and will apply the Words to that which in common Presumption may be taken to be their Intent’.⁹¹ It was also recognised that this approach did not fit well with the *contra proferentem* rule: Sjts Stanford and Walsh argued that *contra proferentem* could not be applied to a deed made by multiple parties, ‘because the law makes each Party privy to the Speech of the other’.⁹² Perhaps this is why the courts often preferred to think in terms of reasonableness: it enabled them to arbitrate between the two parties without the need to distinguish between their individual intentions.⁹³

⁸⁶ *Chapman v Dalton* (n 52) 290a.

⁸⁷ *Browning v Beston* (n 64) 136.

⁸⁸ *ibid* 138.

⁸⁹ *ibid* 140a.

⁹⁰ *Reniger v Fogossa* (1550) Plow 1, 17.

⁹¹ *Browning v Beston* (n 64) 140.

⁹² *ibid* 134.

⁹³ Alexander Lüderitz, *Auslegung von Rechtsgeschäften: vergleichende Untersuchung anglo-amerikanischen und deutschen Rechts* (Karlsruhe, C F Müller, 1966) 249.

Notably, this approach was very similar to the way they treated statutes. Like contracts, Acts of Parliament were made by multiple parties: ‘so manie statute makers, so many myndes.’⁹⁴ Again, the intentions behind the instrument were paramount, and the courts were inclined to identify the legislator’s intention with what they thought was reasonable. They used very similar presumptions: assuming, for example, that none of the Act had been intended to be void,⁹⁵ and that Parliament would never intend to pass ‘a very unreasonable’ statute.⁹⁶ Indeed, they were prepared to admit that these legislative intentions were sometimes all but fictional, constructed in order to legitimise the court’s preferred interpretation.⁹⁷

The courts, then, were developing a sophisticated conception of the parties’ intentions, based on the meeting of their minds. Because deeds were made by the agreement of multiple parties, it was impossible to interpret them in accordance with each party’s actual intentions. It was therefore necessary to construct notional reasonable parties, and the intentions that they would have had.⁹⁸ This then freed lawyers to derive contractual intentions from their own ideas of reason, something that was notably absent from the interpretation of wills. Although lawyers of this period rarely engaged in explicit philosophising about the nature of contracts, their approach to interpretation reveals that a great deal of implicit theory was lying beneath the surface.

E. Interpretation and Equity

It might be asked why the intentions of the parties were quite so important to lawyers of the sixteenth century. After all, Broke CJ had made a reasonable point: a great deal of ‘Confusion and Incertainty’ could be caused by the courts’ creative interpretations. Since there was so little contract law theory at the time, this question can best be answered by analogy with statutory interpretation. As we have seen, the courts took strikingly similar approaches to the construction of deeds and statutes. There was also a significant cross-pollination of ideas between the two areas. For example, in *Bold v Molineux*, counsel argued that deeds were ‘private laws between party and party’,⁹⁹ and Fitzherbert and Baldwin JJ held that ‘the intention of the makers and

⁹⁴ Thorne (ed), *A Discourse upon the Exposition & Understandinge of Statutes* (n 19) 151.

⁹⁵ *A Treatise Concerning Statutes* (n 19) 58.

⁹⁶ *Stowel v Lord Zouch* (1564) Plow 353a, 364.

⁹⁷ See, eg, *Reniger v Fogossa* (n 90) 13a: ‘they construed the Minds of the Makers of the Statute, out of mere Necessity to avoid a Mischief’.

⁹⁸ As noted by Lord Hoffmann, ‘The Intolerable Wrestle with Words and Meanings’ (n 12) 664.

⁹⁹ *Bold v Molineux* (n 61) 15a.

parties shall be expounded' in both 'deeds and statutes'.¹⁰⁰

These similarities did not escape lawyers of the time. Hake, for example, observed that 'in the exposition of deedes, contractes and willes it may be affirmed withowte absurdity that *Equity* in every of them beareth rule very greatly'.¹⁰¹ For Hake, equity was closely connected with the intentions of the parties. 'At all tymes and in all ages,' he declared, 'the judges of the lawe have expounded bothe deedes and contractes not precisely or strictly according to ye words, [but] by *Equity*, that is to saye, according to the intent of the parties'.¹⁰² Similarly, statutes were 'taken and expounded according to the intent of those that were the makers of the same statute'.¹⁰³

We can, then, better understand the courts' attachment to contractual intentions by examining their equitable construction of statutes. This was famously outlined by Plowden in his report of *Eyston v Studd*. He explained that 'it is not the Words of the Law, but the internal Sense of it that makes the Law', and warned that 'it often happens that when you know the Letter, you know not the Sense, for sometimes the Sense is more confined and contracted than the Letter, and sometimes it is more large and extensive'.¹⁰⁴ In order to determine whether equity should diminish or enlarge the words of a particular Act,

it is a good Way, when you peruse a Statute, to suppose that the Law-maker is present, and that you have asked him the Question you want to know touching the Equity, then you must give yourself such an Answer as you imagine he would have done, if he had been present.¹⁰⁵

This could result in an interpretation that seemed quite contrary to the words of the statute. However, this was not a problem if it was 'guided by the Intent of the Legislature... and according to that which is consonant to Reason and good Discretion'.¹⁰⁶ Plowden compared the letter of the law to the shell of a nut, observing that 'you will receive no Benefit by the Law, if you rely only upon the Letter'. Rather, 'as the Fruit and Profit of the Nut lies in the Kernel, and not in the Shell, so the Fruit and Profit of the Law consists in the Sense more than in the

¹⁰⁰ *ibid* 17a.

¹⁰¹ Hake, *Epieikeia* (n 70) 51.

¹⁰² *ibid*.

¹⁰³ *ibid* 85.

¹⁰⁴ *Eyston v Studd* (1574) Plow 459a, 465.

¹⁰⁵ *ibid* 467.

¹⁰⁶ *Stradling v Morgan* (n 73) 205a.

Letter'.¹⁰⁷ Sjt Saunders, likewise, explained that 'Words, which are no other than the Verberation of the Air, do not constitute the Statute, but are only the Image of it'.¹⁰⁸

And the same was true of the words of a contract. As Sjt Catlyn had put it, 'the Agreement of the Minds of the Parties is the only Thing the Law respects in Contracts',¹⁰⁹ and Saunders J argued that 'the Words are no other than the Testimony of the Contract'.¹¹⁰ The words of the deed were only evidence of the parties' intentions, and it was the latter that gave the contract its true force and meaning.

IV. Two Approaches to Interpretation

Contractual interpretation in the mid-sixteenth century, then, was primarily concerned with implementing the intentions of the parties. These could be discovered from the document itself; from the surrounding context; or from the court's understanding of what reasonable parties would have wanted. It was understood that legal instruments gained their normative force from the intentions behind them, rather than the words that constituted them.

This is a far cry from the 'stiff and superstitious formalism' we were promised. Indeed, in many ways it is very similar to the modern approach to interpretation. A lawyer from the sixteenth century, presented with Lord Hoffmann's five *ICS* principles, would find much comfortingly familiar. He would readily agree, for example, that the meaning of a document was something very different from the meaning of its words, and that even unambiguous words should be given a different meaning if it seemed clear that the parties had made a mistake with their language.¹¹¹

The terminology of the 'factual matrix' would be new to him, but the concept would not be wholly foreign. There was a rule in his period that the words of a deed could not be varied by parol evidence,¹¹² but evidence could certainly be admitted to show what the words meant.¹¹³ In *Hawes v Davye*, for example, Davye had agreed to pay Hawes £60 before 24 September if his ship took a prize. Davye argued that, if the ship did not take a prize, he was not bound to pay the £60 at all; Hawes, that the debt would fall due on 24 September if no prize was taken before then. The court looked to the circumstances behind the agreement to explain the term: 'it well

¹⁰⁷ *Eyston v Studd* (n 104) 465.

¹⁰⁸ *Partridge v Strange & Croker* (1553) Plow 77, 82.

¹⁰⁹ *Browning v Beston* (n 64) 140a.

¹¹⁰ *Throckmerton v Tracy* (n 33) 161a.

¹¹¹ *Investors Compensation Scheme v West Bromwich Building Society* (n 1) 913.

¹¹² Simpson, *A History of the Common Law of Contract* (n 13) 96.

¹¹³ *Edward Altham's Case* (1610) 8 Co Rep 150b, 155a.

appears that the sum of £60 was due before the bond was made, and the extremity of the payment was deferred until 24 September'.¹¹⁴ In other cases, the judges considered supporting documents that helped to explain the intentions of the parties.¹¹⁵

Elsewhere, however, our lawyer would be on less certain ground. He might find himself nonplussed by Lord Hoffmann's definition of interpretation: 'the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties'.¹¹⁶ At first glance, this looks very much like the approach of the early modern courts, but it is important not to exaggerate the similarities. While they clearly have much in common, the two approaches start from very different understandings of the nature of contracts and legal interpretation.

Firstly, judges today ask themselves what meaning the document would convey to a reasonable reader. Sixteenth-century courts did not feel the need to introduce this cipher in order to distance themselves from their own interpretations.¹¹⁷ More importantly, however, they did not ask how a reader would understand the document at all. They were much more concerned with what they thought the writer must have meant by it: with what Chen-Wishart describes as 'actor', rather than 'observer', objectivity.¹¹⁸ While this may seem like a relatively minor distinction, it points to a conceptual gulf underlying the two courts' invocations of reasonableness.

In modern law, we ask ourselves how a reasonable person would understand the parties' intentions, partly for pragmatic reasons (the impossibility of knowing their actual intentions), but partly because of substantive theories about the nature of legal instruments.¹¹⁹ Contracting parties are not bound to each other's unexpressed whims; this would undermine certainty and prevent parties from planning their lives on the basis of their apparent contract.¹²⁰ Observer objectivity is favoured for the fullness of the protection it gives to the reader's expectations.¹²¹ While we recognise that this approach may thwart the parties' actual intentions, we find this justifiable given the other normative commitments of contract law.

¹¹⁴ *Hawes v Davye* (1565) Dyer (109 SS) 119.

¹¹⁵ *Vavisor's Case* (1572) Dyer 307b.

¹¹⁶ *Investors Compensation Scheme v West Bromwich Building Society* (n 1) 912.

¹¹⁷ See *Davis Contractors Ltd Appellants v Fareham Urban District Council Respondents* [1956] AC 696, 728.

¹¹⁸ Mindy Chen-Wishart, 'Contractual Mistake, Intention in Formation and Vitiating: The Oxymoron of *Smith v Hughes*' in Jason W Neyers, Richard Bronaugh and Stephen GA Pitel (eds), *Exploring Contract Law* (Oxford, Hart Publishing, 2009) 349.

¹¹⁹ Lord Hoffmann, 'The Intolerable Wrestle with Words and Meanings' (n 12) 664.

¹²⁰ Chen-Wishart, 'Contractual Mistake' (n 118) 346.

¹²¹ *ibid* 350.

However, these kinds of concerns were not very important for sixteenth-century judges. Attitudes had changed dramatically since the medieval period: the courts now thought that it was better to have a fair result than a predictable one. Aside from Broke CJ's abortive dissent in *Throckmerton*, and some passing references to the desirability of settling disputes,¹²² legal certainty was just not something the courts worried about. When they invoked reasonableness in the context of interpretation, it was not so that the parties would have a reliable text to work from; it was because they thought that the parties would have wanted to make a reasonable contract in the first place. There was no acknowledgment that injecting reason into a contract might thwart their real intentions, or that the parties might actively prefer a more literalist approach.¹²³ Indeed, in the context of statutes, lawyers brushed aside concerns that it might be difficult for laymen to understand the meaning of the text: even if the court's interpretation was unpredictable, it would undoubtedly be just, and nobody could possibly take issue with that.¹²⁴ These approaches to interpretation, then, are products of convergent evolution. Two legal systems with very different commitments and values arrived at much the same result: interpretation based on the intentions of the parties, identified from what would have been reasonable in the circumstances.

And our sixteenth century lawyer would also be unperturbed by other aspects of modern law. For example, much angst has been caused by contract law's 'interpretive turn', in which previously free-standing legal doctrines have been rationalised as aspects of contractual interpretation. Carter and Courtney, for example, write that it is 'easy to understand the reluctance to confront the suggestion that a material chunk of the common law can be explained simply in terms of what contracts "mean"'.¹²⁵ Our lawyer would probably ask how else the law *could* be explained. Issues that are dealt with today by doctrines like mistake, frustration or implication were simply mopped up by interpretation.¹²⁶ The interpretive turn is, in many ways, a return to contract law before contract law was invented in the nineteenth century.

Critics of the law today fret that interpretation has become unprecedentedly creative, and is newly encroaching on domains that properly belong to other doctrines. Davies, for

¹²² See, eg, *Colthirst v Bejushin* (n 50) 25; *Stowel v Lord Zouch* (n 96) 356a.

¹²³ As is arguably the case with commercial contracts today: see generally Morgan, *Contract Law Minimalism* (n 4) 229.

¹²⁴ Hake, *Epieikeia* (n 70) 92.

¹²⁵ JW Carter and Wayne Courtney, 'Belize Telecom: A Reply to Professor McLauchlan' [2015] LMCLQ 245, 249.

¹²⁶ On implication, see, eg, *Reniger v Fogossa* (n 90) 15; *Kidwelly v Brand* (1551) Plow 69, 70; *Ayer v Orme* (1563) Dyer 221b, 222b. On mistake and frustration, see generally David Ibbetson, 'Fault and Absolute Liability in Pre-Modern Contract Law' [1997] *Journal of Legal History* 1.

example, has accused interpretation of ‘expanding beyond its proper scope’ into areas ‘traditionally encompassed’ by the doctrines of implication and rectification.¹²⁷ There is widespread fear that we are journeying into the unknown: Wee argues that judges have ‘never’ before had such a ‘broad, unstructured and unfettered discretion’ to construe contracts.¹²⁸ He predicts that ‘insurmountable theoretical and pragmatic problems’ will be the result,¹²⁹ as the meaning of contracts becomes ‘dangerously unpredictable’¹³⁰ and established rules are undermined.¹³¹ But interpretation has certainly gone as far and even further before. The reading of ‘reversion’ to mean ‘possession’ in *Throckmerton* was just as radical as a modern interpretation of ‘landlord’ to mean ‘tenant’,¹³² and rendered rectification just as unnecessary.¹³³ And this excursion into the past is not merely of antiquarian interest. Rather, it allows us to peer into the future. These critiques of the modern law could be equally applied to interpretation in the sixteenth century: how, then, did this earlier experiment with liberal interpretation play out?

V. The Seventeenth Century and Beyond

Firstly, it is clear that similar concerns were creeping in throughout the sixteenth century. Although they had not yet filtered through to the courts, complaints were beginning to appear in the literature of the time. Thomas Wilson castigated lawyers in his book on rhetoric, griping that,

rather than fail, they will make doubts oftentimes where no doubt should be at all. ‘Is his lease long enough,’ quod one? ‘Yea sir, it is very long,’ said a poor husbandman. ‘Then,’ quod he, ‘let me alone with it; I will find a hole in it, I warrant thee.’¹³⁴

Thomas Elyot lamented that it was impossible to ‘devise so sufficient an instrument, to bynde a

¹²⁷ Paul S Davies, ‘Recent Developments in the Law of Implied Terms’ [2010] LMCLQ 140, 145; Paul S Davies, ‘Rectification versus Interpretation: The Nature and Scope of the Equitable Jurisdiction’ (2016) 75 CLJ 62, 66.

¹²⁸ Paul CK Wee, ‘Contractual Interpretation and Remoteness’ [2010] LMCLQ 150, 176.

¹²⁹ *ibid* 175.

¹³⁰ *ibid* 166.

¹³¹ *ibid* 176.

¹³² *Littman v Aspen Oil (Broking)* [2005] EWCA Civ 1579, [2006] 2 P&CR 2.

¹³³ It was possible to have a deed rectified in Chancery during the sixteenth century: see, eg, 117 SS 260, [220] and [221]. However, rectification cases were very rare. In *Goodfellow v Morris and Others* (1618), precedents had to be shown to prove the existence of the jurisdiction: John Ritchie, *Reports of Cases Decided by Francis Bacon in the High Court of Chancery, 1617-1621* (London, Sweet & Maxwell, 1932) 133. I am grateful to Astron Douglas for this point.

¹³⁴ Thomas Wilson, *The Art of Rhetoric (1560)* (Peter E. Medine ed, University Park, Pennsylvania State University Press, 1994) 130.

man to his promyse or covenant, but that there shall be some thinge therein espied to brynge it in argument'.¹³⁵ Even Hake raised the argument that it might be 'daungerous' to allow judges too much discretion in interpreting, although he was quick to dismiss it.¹³⁶

By the beginning of the seventeenth century, however, judges were beginning to express similar anxieties. These were part of a wider phase of uncertainty about the law: the intellectual blossoming of Renaissance scholarship, and the recent proliferation of printed texts, had left the legal profession floundering in a mass of new materials.¹³⁷ Furthermore, litigation rates were rocketing to unprecedented levels, leading to accusations that the law was fomenting dispute and undermining social order.¹³⁸ Lawyers were starting to point the finger at interpretation as a force behind both of these developments.

Edward Coke, for example, argued that the courts were spending too much time trying to save badly drafted contracts. Uncertainty in the law, he explained, was not caused by 'any of the rules of the common law', but by 'conveyances and instruments made by men unlearned',¹³⁹ which forced judges to 'so often and so much perplex their heads, to make attonement and peace by construction of law between insensible and disagreeing words, sentences, and provisoes'.¹⁴⁰ New and increasingly complex forms of drafting led to the 'miserable slavery' of legal uncertainty, since nobody could determine their meaning.¹⁴¹ Coke also criticised the parties in interpretation cases, whom he saw as 'eagle-eyed' predators, exploiting the law to raise questions about perfectly straightforward documents.¹⁴² Their 'strained' and opportunistic constructions undermined conveyances, to 'the disherison of the subject, and against the true reason and ancient rule of the law'.¹⁴³

In response to these concerns, the courts' approach to interpretation was evolving. The words the parties had chosen to use were associated ever more closely with their intentions: judges were increasingly likely to ask what 'the intent and the words import',¹⁴⁴ and slid between

¹³⁵ Sir Thomas Elyot, *The Boke Named the Governour* (London, Thomas Berthelet, 1531) 195v.

¹³⁶ Hake, *Epieikeia* (n 70) 25.

¹³⁷ David Chan Smith, *Sir Edward Coke and the Reformation of the Laws: Religion, Politics and Jurisprudence, 1578-1616* (Cambridge, Cambridge University Press, 2014) 19, 144.

¹³⁸ CW Brooks, *Pettyfoggers and Vipers of the Commonwealth: The 'Lower Branch' of the Legal Profession in Early Modern England* (Cambridge, Cambridge University Press, 1986) 133. The number of cases brought at common law had increased from around 5000 in 1560 to over 23,000 in 1606: *ibid* 51.

¹³⁹ 2 Co Rep ix.

¹⁴⁰ *ibid* x.

¹⁴¹ *Sir Anthony Mildmay's Case* (1605) 6 Co Rep 40a, 42a ('misera est servitus, ubi jus est vagum').

¹⁴² 10 Co Rep xiv.

¹⁴³ *Roger Earl of Rutland's Case* (1608) 8 Co Rep 55a, 56b.

¹⁴⁴ *Englefields Case* (1590) Moore 303, 336 ('l'entent & les p[ar]ols emporto[n]t').

references to the meaning of the parties and the meaning of the document.¹⁴⁵ They also began to present interpretation as a logical system of principles and maxims, rather than an amorphous discretion. The arguments in *Shelley's Case*, for example, focused primarily on establishing the intentions of Edward Shelley, but the court's decision was reported as a formal rule of law.¹⁴⁶ Judges resorted to authority to bolster principles, like the *contra proferentem* rule, that had previously been taken for granted,¹⁴⁷ or to support their interpretation of a particular word. In *Edward Altham's Case*, for example, a dozen cases were cited to help define the word 'right',¹⁴⁸ whereas, thirty-five years earlier, Plowden had simply plucked his definition from 'Reason... the Key which pierces and opens the Sense of obscure Words'.¹⁴⁹ While intentions remained central to interpretation, the courts attempted to play this down, instead emphasising the words of the document, the primacy of legal rules, and the reliability of precedent.

Judges were also keen to stress that the parties' intentions could not ride roughshod over existing legal rules. Typically, they now pronounced that 'the law will not make an exposition against the express words and intent of the parties, when it may stand with the rule of law': a striking change of emphasis.¹⁵⁰ In *The Lord Cromwel's Case*, for example, it was held that an interpretation of a contract based on reason must bow to established rules. 'There should be no departure from common usage,' the court maintained, 'and those things which have had a certain interpretation should be changed least'.¹⁵¹ Coke approvingly quoted the philosopher Theophrastus: 'he who seeks reason in everything, subverts reason'.¹⁵² Providing certainty for the parties was a growing preoccupation of the courts, and was again beginning to displace their dedication to finding a reasonable result.

However, the courts were by no means plunging headlong into literalism. Instead, they were trying to steer a middle course. Thus, while Coke rejected a law of interpretation that focused too much on reason, he also argued that a 'nice and captious pretence of certainty, confounds true and legal certainty, and it is a bad exposition that corrupts and confounds the

¹⁴⁵ *Mildmay's Case* (1584) 1 Co Rep 175a, 177a.

¹⁴⁶ *Shelley's Case* (1581) 1 Co Rep 93b. See David A Smith, 'Was There a Rule in Shelley's Case?' (2009) 30 *Journal of Legal History* 53, 69; AWB Simpson, *Leading Cases in the Common Law*, 1st edn (Oxford, Oxford University Press, 1995) 34.

¹⁴⁷ *Humfrey Lofield's Case* (1612) 10 Co Rep 106a, 106b.

¹⁴⁸ *Edward Altham's Case* (n 113) 151b.

¹⁴⁹ *Nichols v Nichols* (1575) Plow 477, 488.

¹⁵⁰ *Butt's Case* (1600) 7 Co Rep 23a, 24a. The rules in question were usually rules of land law, such as the rule against perpetuities.

¹⁵¹ *The Lord Cromwel's Case* (1601) 2 Co Rep 69b, 74a ('non est recedendum a communi observantia, & minimè mutanda sunt quae certam interpretationem habuerunt'). See also Justinian's *Digest*, D.1.3.23.

¹⁵² *ibid* 75a ('qui rationem in omnibus quaerunt, rationem subvertunt').

text’.¹⁵³ He was well aware that ‘a literal and strict construction’ could thwart the parties’ intentions,¹⁵⁴ and argued that documents ‘should be liberally and beneficially expounded’ to quash opportunistic quibbling.¹⁵⁵ The courts strove to find a balance between unrealistic strict construction and a broad-brush approach that failed to provide certainty.

The next revolution in contractual interpretation, then, was a quiet one: unsettled by the uncertainties of liberal construction, the courts tacked towards a more predictable approach. While mid-century lawyers like Plowden and Hake had been supremely confident in the powers of interpretation, the next generation were more diffident. Their views of legal interpretation became more nuanced, and perhaps more realistic.

VI. Conclusion

Revolutions in contractual interpretation are not a phenomenon new to English law. Arguably the greatest innovation came in the mid-sixteenth century, when the courts first began to engage in interpretation as a self-conscious and systematic activity. It does a disservice to the common law to ignore this fascinating period, or indeed to assume that all lawyers before the mid-twentieth century suspended their intellectual faculties when presented with a contract to construe. In fact, examining earlier approaches to this perennial issue can help to provide a new perspective on the law of our own time.

On this view, it seems clear that recent changes to contractual interpretation follow a pattern that is well established in the history of the common law. The development of contractual interpretation has not been a straightforward progress; rather, it has oscillated between more or less liberal and literal approaches for centuries. Some of these shifts have been prompted by social and cultural changes: new technology, perhaps, or a more sophisticated understanding of language. They may also form part of a wider legal trend, as lawyers react to the perceived shortcomings of the past. Indeed, lawyers’ perceptions that their law is causing problems seem to have been much more influential than any complaints by laymen.

As a result, we should not be surprised if contractual interpretation continues to evolve: *ICS* was not the end of history. Indeed, adverse commentary on Lord Hoffmann’s approach is already having its effect, as the courts stress the importance of the parties’ words¹⁵⁶ and

¹⁵³ *Roger Earl of Rutland’s Case* (n 143) 56b (‘et maledicta expositio est quae corrumpit et confundit textum’).

¹⁵⁴ *ibid.*

¹⁵⁵ *Twyne’s Case* (1601) 3 Co Rep 80b, 82a.

¹⁵⁶ *Rainy Sky SA v Kookmin Bank* [2011] UKSC 50, [2011] 1 WLR 2900, 2908.

established legal rules¹⁵⁷ in the context of construction. Lawyers will, undoubtedly, continue to argue over the best approach to interpretation. However, it is no defence of any theory to hearken wistfully back to the ‘traditional approach’ of English law. There is no such thing. The evolution of the common law of interpretation has been much more complex, and more interesting, than that.

¹⁵⁷ *Marks and Spencer plc v BNP Paribas Services Trust Co (Jersey) Ltd* [2015] UKSC 72, [2016] AC 742, 757.